

International Human Rights Law and the Events of 2001: Has the World Changed Forever?

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I. Introduction

The purpose of this article is to consider whether two events in 2001 (the terrorist attacks in the United States and the arrival of the M/V *Tampa* in Australian waters) represented a watershed point (or points) in the development of international human rights law and the application of that law in Australia. Or, as Paul Hoffman (the Chair of the International Executive Committee of Amnesty International) asked in 2004, '[d]id the events of September 11, 2001, change the world forever?'.¹ Hoffman's question echoes a similar enquiry by Michael Ignatieff in the title of his 2002 opinion piece in *The New York Times*: 'Is the Human Rights Era Ending?'.² On one view of the impact of September 11, the war on terrorism 'threatens to undermine the international human rights framework so painstakingly built since World War II'.³ In accordance with this view, there has been a shift in resources away from the promotion and protection of human rights towards the global fight against terrorism, and, associated with this shift, a narrowing of the public space devoted to discussing human rights. This view appears to be premised on an understanding that there has been an essentially linear progress in the development and implementation of laws devoted to human rights protection since 1945, but that this linear development has been broken by the war on terrorism. Thus, the world became less 'human rights friendly' as a result of the events of 2001. In this article I propose to reflect on this argument and to investigate an alternative view: while the events of 2001 were significant for international human rights law, they did not fundamentally change the way in which human rights scholars discuss and practice the discipline of international human rights law.

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¹ P Hoffman, 'Human Rights and Terrorism' (2004) 26 *Human Rights Quarterly* 932.

² M Ignatieff, 'Is the Human Rights Era Ending?' *New York Times* (online) (5 February 2002) <<http://www.nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html?pagewanted=all&src=pm>>.

³ Hoffman, above n 1, 932. See also M Scheinin, 'Terrorism', in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (2010) 599: 'The terrorist acts of 9/11 have led to the worst backlash in the international protection of human rights since the inclusion of the notion of human rights in the UN Charter, in the aftermath of the Second World War'.

It is no small task to be asked to consider the impact of the events of 2001 on international human rights law. When invited to participate in the ANU forum 'Tampa and 9/11: Ten Years On' with the stated task of 'reflecting upon developments in international [human rights] law arising from ... the *Tampa* incident and the 2001 terrorist attacks on the United States', I was initially (and still am) overwhelmed by the diversity of issues and perspectives that could contribute to the debate. Should I concentrate on civil and political rights on the basis that much of the commentary deals with issues arising from the use of police powers and detention in the war on terror? On the other hand, would it be more appropriate to examine the way in which the war on terror has potentially diverted attention away from other human rights issues, such as economic and social rights, particularly in developing countries? Whose perspectives are the most relevant in determining the impact of 2001 on international human rights law? Should I examine the legislative and executive responses in countries such as Australia, the United States and the United Kingdom? Would any attempt to limit the discussion to these countries be arbitrary given the wide-ranging legal responses to the war on terror throughout the world? Is it possible to gather data tracking the impact of the events of 2001 on the development and implementation of international human rights law?

Leaving aside these questions, there are many different methods by which the impact of the events of 2001 on international human rights law could be measured. For example, a potential (and lengthy) approach would be to provide a catalogue of laws, both international and Australian, which have been promulgated, altered or violated as a result of the events of 2001. It would also be possible to discuss the space devoted to the promotion and protection of human rights from the perspective of non-governmental organisations (NGOs) and the changes that they have made to their practices as a result of perceived government or public hostility to human rights claims after 2001. However, as commentators, NGOs and the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism have attempted this task already,⁴ it will not be the approach adopted here. An analysis of the caseload of institutions charged with the task of considering individual petitions pursuant to human rights treaties, including the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights, may disclose the extent to which their work has been dominated (or otherwise) by allegations of abuses arising from responses to September 11. The priority accorded to particular human rights

⁴ For example, the website of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (established in April 2005) provides much information on the impact of counterterrorism measures on human rights. In the Australian context, a human rights response to Australia's counterterrorism laws and Australia's attitude to David Hicks' detention can be found at Human Rights Law Centre *Counter-Terrorism* <<http://www.hrlc.org.au/our-work/topics/counter-terrorism/>>. For a comparative examination of the laws in four Commonwealth countries see A Conte, *Human Rights in the Prevention and Punishment of Terrorism* (2010). For a discussion of the impact of the events of September 11 on the work of NGOs, see International Council on Human Rights Policy, *Human Rights After September 11* (2002) <http://www.ichrp.org/files/reports/29/118_report_en.pdf>.

issues in the Office of the United Nations High Commissioner for Human Rights and the various UN special procedures would also provide a method of evaluating the importance of the events of 2001 for international human rights law.

For the purposes of this article, I have defined my enquiry to a much narrower field. First, as the initial paragraph suggests, I want to reflect on the question whether 2001 changed the world of international human rights law. My interest in this question derives from my involvement in an interdisciplinary subject, 'Human Rights and Global Justice', which includes perspectives from the disciplines of history, medicine, law and political science. Human rights have both a very long and a very short history.⁵ The long version places the origins of rights in the Magna Carta, natural rights, the American Declaration of Independence, the Enlightenment, the anti-slavery movement or any number of events. However, the short version – the version concentrating on the development of international human rights law – can be dated much more recently. Second, I have decided to reflect on the question whether the events of 2001 have impacted on the way in which human rights scholars write about and teach international human rights law, particularly in Australia. This approach is based on the assumption that the way in which we approach our discipline through research and teaching represents one method of measuring the significance of 2001. By focusing on the research priorities of scholars and commentators and the content of human rights law courses in Australia we can gain an understanding of the way in which the terrorist attacks of September 11 and the arrival of the *M/V Tampa* changed the focus of discussion in the discipline of international human rights law. With this aim in mind, Part III of this article will examine legal scholarship with particular reference to the articles published in five human rights journals over a 16-year period (1995–2011) to determine whether there has been any alteration in the publication priorities of authors (and journals) as a result of the events of 2001. Part IV will analyse the teaching of human rights law in Australian universities, once more with the aim of highlighting any changes to the content of subjects devoted to this field. If September 11 and the arrival of the *M/V Tampa* 'changed the world' (or changed our world in Australia) then we would expect to see a concomitant change in the way in which the discipline of human rights is approached through research and teaching.

II. The Development of International Human Rights Law

When Hoffman published his 2004 article entitled 'Human Rights and Terrorism', troops were deployed in the war on terrorism in Afghanistan, the coalition forces were in occupation of Iraq, and the terrorist attacks in Madrid on 11 March 2004 confirmed that the threat from terrorism in Western democracies was 'real, substantial, and ongoing'.⁶ Of particular relevance to discussions of the international human rights framework, the detention centre at Guantánamo Bay had been

⁵ For a debate on the origins of human rights and humanitarianism I am grateful to Dr Barbara Keys for recommending S Moy n, 'Spectacular Wrongs' *The Nation* (13 October 2008) 30; G J Bass, 'The Old New Thing' (2010) 241(18) *The New Republic* 35.

⁶ Hoffman, above n 1, 933.

operating for two years and questions were being raised about the lack of judicial oversight of detention as well as the methods of interrogation. Additionally, reports were emerging of prisoner abuse in Abu Ghraib and the practice of extraordinary rendition. In this context, it is not surprising that Hoffman asked the question whether the events of September 2001 had changed the world forever. However, as Hoffman recognised it may have been ‘too soon to tell’ in 2004 whether September 2001 was ‘world changing’.⁷ Consequently, any discussion of the significance of the events of 2001 for international human rights law needs to acknowledge that our answer to this question in 2011 will be different to the answer which we would have given in 2004 or 2005, and different again from the answer which we may give in 2021. In this context, it is necessary to locate the significance of the terrorist attacks of 11 September and the arrival of the M/V *Tampa* in Australia in terms of the history of the development of international human rights law and its application in Australia. The purpose of this section is not to canvass every advance or setback in international human rights law (either before or after 2001), but rather to reflect on the question whether the events of 2001 fundamentally altered, or caused a break, in the development of the discipline.

(a) History and international human rights law — a longer-term view

Most accounts of the history of international human rights law, as distinct from the history of the human rights movement, civil liberties or constitutional rights, begin with the close of World War II, an acknowledgment of the horrors perpetrated during that war, the birth of the United Nations (UN) and the adoption of the Universal Declaration of Human Rights (UDHR). These accounts generally highlight the significant progress made in drafting human rights instruments, particularly treaties, while also recognising the many problems encountered on the way. The following three accounts, written in 1945, 1979 and 1998 respectively, emphasise this view of history:

The two decades which followed the first World War lent weight, with ominous emphasis, to these now self-evident propositions [that the law must protect individual human beings]. They have resulted, in the second World War, in the widespread conviction that some form of an International Bill of the Rights of Man is a major purpose of the war, inasmuch as it is an essential condition of international peace and international progress.⁸

Law to control how states behave towards their own inhabitants, developed during the decades since the end of the Second World War, has faced extraordinary obstacles.⁹

The events of the Second World War brought human rights violations into prominence and since its end there has been an enormous commitment to the legal guarantee of human rights and fundamental freedoms.¹⁰

7 Ibid.

8 H Lauterpacht, *An International Bill of the Rights of Man* (1945) 7.

9 L Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed, 1979) 228.

10 C Chinkin, ‘International Law and Human Rights’ in T Evans (ed), *Human Rights Fifty Years On: A Reappraisal* (1998) 105.

The difficulties encountered with the legal articulation and enforcement of human rights since World War II have included the non-binding nature of the UDHR,¹¹ continued assertions of sovereignty and domestic jurisdiction by states in the face of allegations of abuses, the unwillingness of governments (and indeed the Commission on Human Rights) to scrutinise the records of other countries,¹² and most obviously, gross human rights violations.¹³ By 1965 Louis Henkin was already suggesting that the ‘behaviour of nations in regard to human rights has not been distinguished even since 1945’.¹⁴ In more recent decades, writers have questioned whether law is in fact a useful discipline for promoting and protecting human rights — asking whether international law is a worthwhile instrument for attaining human dignity,¹⁵ whether the concept of human rights is too broad or too narrow¹⁶ or a part of the ‘European colonial project’,¹⁷ and whether the human rights movement may have ‘possible risks, costs, and unanticipated consequences’.¹⁸ There are also continuing debates about the authorship of the pre-eminent human rights document of the time, the UDHR: was it purely a product of the Western powers and their representatives (did any of the Great Powers try and ‘brush human rights under the carpet’)¹⁹ or was there significant input from Asia, Africa and smaller states?²⁰

Leaving aside these critiques, it is important to recognise that, despite the ‘mushrooming’²¹ of international documents since 1945 (and more particularly,

¹¹ H Lauterpacht, *International Law and Human Rights* (1950) 279.

¹² Henkin, above n 9, 228–29. In 1947, in the face of numerous petitions from individuals alleging breaches of their human rights, the Commission on Human Rights declared that it had no jurisdiction to consider individual complaints alleging violations of human rights: see P G Lauren, “‘To Preserve and Build on its Achievements and to Redress its Shortcomings’: The Journey from the Commission on Human Rights to Human Rights Council” (2007) 29 *Human Rights Quarterly* 307, 315.

¹³ Christine Chinkin notes that ‘[d]espite the legal and bureaucratic energy invested in human rights guarantees, these standards are regularly and routinely infringed throughout the world’: Chinkin, above n 10, 105–6.

¹⁴ L Henkin, ‘The United Nations and Human Rights’ (1965) 19 *International Organization* 504, 513.

¹⁵ See discussion in Chinkin, above n 10, 105.

¹⁶ Hilary Charlesworth has argued that the concept of human rights has failed to take into account the experiences of women; whereas Philip Alston has argued for a more rigorous procedure when proclaiming new human rights: see H Charlesworth, ‘What are “Women’s International Human Rights”?’ in R Cook, *Human Rights of Women: National and International Perspectives* (1994) 60; P Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78 *American Journal of International Law* 607.

¹⁷ M Mutua, *Human Rights: A Political and Cultural Critique* (2002) 155.

¹⁸ D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2005) 3.

¹⁹ M Mazower, ‘The Strange Triumph of Human Rights, 1933–1950’ (2004) 47 *The Historical Journal* 379, 392.

²⁰ See R Burke, *Decolonisation and the Evolution of International Human Rights* (2010) 145; S Waltz, ‘Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights’ (2002) 23 *Third World Quarterly* 437.

²¹ J Rehman, *International Human Rights Law: A Practical Approach* (2003) 3.

since 1966), it has not been a continuous upward trajectory towards the legalisation of human rights. Samuel Moyn writes that for many decades after the adoption of the UDHR, human rights ‘failed to interest many people — including international lawyers — [in the 1940s] or for decades’.²² He points to the marginalisation of human rights principles in the Charter of the United Nations and the skepticism surrounding the idea of human rights during the Cold War.²³ For Moyn, the 1970s are the decade that saw human rights become ‘a utopia of international law’;²⁴ while other writers give weight to the 1990s as the period when human rights expanded through the adoption of legal instruments and the establishment of international criminal tribunals.²⁵ One example of a human rights provision that has been the subject of much discussion in the context of the war on terror is the prohibition on torture. But despite the fact that the prohibition on torture was included in Article 5 of the UDHR in 1948 and is now regarded as a *jus cogens* principle of international law,²⁶ it was not until the 1970s that the fight against torture gained traction and took on a legal focus. Amnesty International’s campaign against torture only began in 1966 and was originally moral in orientation, derived from its work on prisoners of conscience. In the 1970s the organisation began to employ lawyers and the focus turned to international law and the development of the legal prohibition against torture.²⁷ This example highlights that although human rights may now be described as occupying ‘the very centre of the activities of international lawyers’,²⁸ it has not always been a smooth ride since 1945, 1948, or indeed 1966. On this view of history, are the events of 2001 just another ‘bump in the road’ (albeit potentially a major one) to the progressive development and implementation of international human rights law? Certainly, this would appear to be the opinion of Paul Gordon Lauren in the three editions of his expansive work on the development of the international protection of human rights, *The Evolution of International Human Rights: Visions Seen*, published in 1998, 2003 and 2011 respectively.²⁹ Although the war on terrorism was already a feature of international

²² S Moyn, *The Last Utopia: Human Rights in History* (2010) 7.

²³ *Ibid* Ch 5: International Law and Human Rights.

²⁴ *Ibid* 7.

²⁵ A D Beauheim, ‘Book Review: The Last Utopia: Human Rights in History by Samuel Moyn’, *Lawfare* (13 January 2012), <http://www.lawfareblog.com/2012/01/the-last-utopia-human-rights-in-history/>; B Cooper, ‘New Birth of Freedom’, *New York Times* (online) (24 September 2010), <www.nytimes.com/2010/09/26/books/review/Cooper-t.html?_r=0>/.

²⁶ For example, see comments by Lord Browne Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)* [1999] 2 All ER 97, 108–9.

²⁷ T Kelly, ‘What We Talk about When We talk about Torture’ (2011) 2 *Humanity* 327, 339. For a discussion of Amnesty International’s role in the prevention of torture see A M Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (2001) ch 3.

²⁸ Moyn, above n 22, 176.

²⁹ P G Lauren, *The Evolution of International Human Rights: Visions Seen* (1998); P G Lauren, *The Evolution of International Human Rights: Visions Seen* (2nd ed, 2003); P G Lauren, *The Evolution of International Human Rights: Visions Seen* (3rd ed, 2011).

discussion and critique by 2003, the second edition of Lauren's book, published in 2003, only devotes a couple of paragraphs to the human rights impacts of the terrorist attacks and the measures taken to combat terrorism, including the right to life of civilians killed on September 11 and the plight of detainees in Abu Ghraib and Guantánamo Bay.³⁰ This discussion was expanded to a few pages in the third edition, published in 2011, to include reference to the use of the war on terror as a pretext by repressive governments to silence political opponents, a more extensive discussion of torture and the practice of extraordinary rendition, and debates on the "idealism" of rights and the "realism" of security'.³¹ This description of Lauren's work is not to suggest that he devoted too little space to the war on terror in his work. In a book which dates the origins of human rights principles to traditions and faiths established over 2,500 years ago³² and therefore projects a history of human rights that spans not just generations, but millennia, confining a discussion of the war on terror to a few pages in the 2011 edition may be an accurate accounting of its place in the development of human rights. In accordance with that approach, Lauren's essentially positive (and triumphalist) conclusion for human rights remains the same in all three editions: 'the perspective of history may offer considerable hope not only for the future, but also for the power of visions seen'.³³

This optimistic conclusion is reinforced by the significant progress in many areas of human rights law, including the creation of international and regional human rights institutions, in the last decade. Since 2001 the Rome Statute of the International Criminal Court has entered into force (2002); the Human Rights Council replaced the Commission on Human Rights (2006); ASEAN created the Intergovernmental Commission on Human Rights (2009) in a region where many have criticised the lack of progress on the institutionalisation of human rights; and the African Court of Human and Peoples' Rights gave its first procedural decision (2009) and its first provisional measures order (2011).³⁴ In Europe, with the growth in the number of members of the Council of Europe, the European Court of Human

³⁰ Lauren, *The Evolution of International Human Rights* (2nd ed, 2003), above n 29, 276–77.

³¹ Lauren, *The Evolution of International Human Rights* (3rd ed, 2011), above n 29, 275–78.

³² Lauren, *The Evolution of International Human Rights* (3rd ed, 2011), above n 29, 7. For a critical analysis of Lauren's discussion of the origins of human rights, see R Afshari, 'On Historiography of Human Rights Reflections on Paul Gordon Lauren's *The Evolution of International Human Rights: Visions Seen*' (2007) 29 *Human Rights Quarterly* 1.

³³ Lauren, *The Evolution of International Human Rights* (3rd ed, 2011), above n 29, 315. See also Lauren, *The Evolution of International Human Rights* (2nd ed, 2003), above n 29, 304; and Lauren, *The Evolution of International Human Rights* (1998), above n 29, 298.

³⁴ *In the Matter of Michelot Yogogombaye v Republic of Senegal*, Application No 001/2008, African Court on Human and Peoples' Rights, 15 December 2009; *In the Matter of the African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*, Application No 004/2011, Order for Provisional Measures, African Court of Human and Peoples' Rights, 25 March 2001.

Rights has been swamped by its own success.³⁵ Indeed, in the preface to the five volume *Encyclopedia of Human Rights*, published in 2009, Andrew Natsios proclaims that '[o]ver the past decade measurable progress, however fitful, has been made in efforts to create an international rules-based system to protect human rights,'³⁶ although David Forsythe is slightly more sanguine in his introduction to the same volume, recognising that human rights thinking 'is under serious challenge'.³⁷ Among relevant challenges, he lists US policy on national security since the events of September 2001 and the rise of authoritarian China.³⁸ In terms of this first challenge, numerous reports have highlighted the way in which international human rights law has been violated by states' use of torture, indefinite detention, extraordinary rendition and discriminatory practices towards particular minority groups as a consequence of government policies adopted in pursuance of the war on terror.³⁹ Given the fundamental nature of the norms breached by states (for example, the prohibition on torture), the significance of these events for the promotion and protection of international human rights is clear. Although some of these practices may have been curbed since they were first revealed in the early and mid-2000s, recent reports continue to reject government responses to the crime of terrorism which fail to respect international human rights law.⁴⁰ Although Forsythe specifically mentions government responses to terrorist actions in his introduction to the encyclopedia, it is also important to acknowledge the significant and long-term human rights impact of terrorist actions on communities throughout the world.⁴¹ Scheinin notes that terrorist actions have led to the destruction of human rights, including 'the right to life, the right to physical integrity, the right to health,

³⁵ S Lagoutte 'The Future of the European Human Rights Control System: Fighting with its Back to the Wall' in S Lagoutte, H Sano and P Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (2007) 25, 27. For a discussion of the problems with the caseload of the European Court of Human Rights see R Wolfrum and U Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (2009).

³⁶ A S Natsios, 'Preface' in D P Forsythe (ed), *Encyclopedia of Human Rights*, (Vol 1, 2009) xiv.

³⁷ D Forsythe, 'Introduction' in D P Forsythe (ed), *Encyclopedia of Human Rights* (Vol 1, 2009) xviii.

³⁸ Ibid.

³⁹ A quick search of the 'Terrorism' section of Human Rights Watch's website produces reports of individual states engaging in practices in the name of the war on terror as well as more general overview reports on particular violations relating to terrorism and counterterrorism: see Human Rights Watch, *Terrorism*, <<http://www.hrw.org/topic/terrorism>>. For more general overviews see Amnesty International, *Amnesty International Report* (2002) <<http://www.amnesty.org>>; Amnesty International, *Amnesty International Report* (2004) <<http://www.amnesty.org>>.

⁴⁰ For example, see International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009) <<http://ejp.icj.org/IMG/EJP-Report.pdf>>; Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (2012) <<http://www.hrw.org/>>.

⁴¹ For a discussion of the impact of the deliberate targeting of civilians for attack, see reports at Amnesty International, *Victims of Terrorism and other Violence by Armed Groups*, <<http://www.amnesty.org/en/campaigns/security-with-human-rights/issues/Victims-terrorism-armed-groups>>.

the right to property ...and so on', however he distinguishes this from the violation of human rights by governments in their counterterrorism operations.⁴² Scheinin reserves the expression 'violation of human rights' to the actions of states on the basis that non-state actors are not bound by international human rights treaties or governed by existing monitoring mechanisms under international law.⁴³ While Scheinin is critical of government responses to terrorism, as well as the procedure of the Counter-Terrorism Committee of the Security Council for listing terrorists, he concludes that 'there are many signs that the pendulum is swinging back' towards human rights compliant practices.⁴⁴

Apart from violations of international human rights law, the war on terrorism may have resulted in less direct, but by no means insignificant, challenges to the protection of human rights. In 2002 the International Council on Human Rights Policy reported that subsequent to the attacks on September 11 it became more difficult to undertake human rights work as the 'political context is less favourable'.⁴⁵ Human rights defenders working on a diverse range of causes have found themselves subject to harassment and intimidation in the name of national security measures.⁴⁶ Furthermore, the war on terrorism has disproportionately affected some sections of society. For example, a recent report by the Center for Human Rights and Global Justice in New York details the way in which the war on terrorism has resulted in adverse consequences for women and sexual minorities.⁴⁷ Perhaps a more profound impact of the war on terrorism on the protection of human rights is that the conduct of the 'war' ignores other 'equally or more pressing challenges to human security', including poverty.⁴⁸ Thus, a further outcome of the attacks on September 11 for the international human rights movement is a shift in resources away from development issues, including the Millennium Development Goals, towards other security concerns.⁴⁹ Finally, the way in which the human rights movement has approached the war on terror has not been without its critics. There are concerns that human rights activists, in their efforts to hold states accountable pursuant to international law, have failed to condemn the actions of terrorists in quite the same terms that they have used for denouncing government

42 Scheinin, above n 3, 584–85.

43 Ibid 585.

44 Ibid 600.

45 International Council on Human Rights Policy, *Human Rights After September 11* (2002) 62, 46 <http://www.ichrp.org/files/reports/29/118_report_en.pdf>. See also H Jilani, 'Reinforcing the Frontlines of Freedom in a Climate of Retreat from Human Rights Commitments' in Carter Center, *Human Rights Defenders on the Frontlines of Freedom: Protecting Human Rights in the Context of the War on Terror* (2004) 26 <<http://www.cartercenter.org/documents/1682.pdf>>.

46 See comments in Carter Center, above n 45, especially 3, 56, 70, 81; and examples in Commonwealth Human Rights Initiative, *Silencing the Defenders: Human Rights Defenders in the Commonwealth* (2009) http://www.humanrightsinitiative.org/publications/chogm/chogm_2009/silencing_the_defenders_chogm_2009_report.pdf>.

47 Center for Human Rights and Global Justice, *A Decade Lost: Locating Gender in the U.S. Counter-Terrorism* (2011) <<http://www.chrgj.org/projects/docs/locatinggender.pdf>>.

48 Hoffman, above n 1, 953.

49 Ibid.

responses.⁵⁰ Consequently, activists may risk losing relevance unless they acknowledge the challenges faced by governments.⁵¹

This brief overview paints a very dim picture of the protection of international human rights since 2001, but the question remains whether the last ten years have been appreciably worse for the legal recognition of human rights than previous decades. Moyn's work would suggest that the legal protection of human rights faced many challenges in the decades after the adoption of the UDHR. In terms of the decade since 2001, the establishment of new institutions has been accompanied by the adoption and entry into force of a number of human rights treaties,⁵² including one devoted to the prohibition on torture.⁵³ The Security Council has passed resolutions exhorting states to comply with international human rights and international humanitarian law,⁵⁴ although earlier Security Council resolutions responding to the terrorist attacks in United States failed to mention human rights law.⁵⁵ There have also been a number of robust legal challenges based on human rights or international humanitarian law principles (not all successful) to the actions of governments in pursuance of the war on terror.⁵⁶ This legal response

⁵⁰ See International Council on Human Rights Policy, above n 4, 9–10.

⁵¹ W F Shultz, *Tainted Legacy: 9/11 and the Ruin of Human Rights* (2003) 173, 178.

⁵² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002); Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); Optional Protocol to the Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007 UN Doc A/61/611 (entered into force 3 May 2008); International Convention for the Protection of Persons from Enforced Disappearance, opened for signature 6 February 2007 UN Doc A/61/488 (entered into force 23 December 2010); Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, opened for signature 24 September 2009 UN Doc A/63/435 (not yet in force).

⁵³ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

⁵⁴ For example, SC Res 1456, UN SCOR, 4688th mtg, UN Doc S/RES/1456 (20 January 2003).

⁵⁵ See SC Res 1390 UN SCOR, 4452nd mtg, UN DOC S/RES/1390 (16 January 2002); SC Res 1455, UN SCOR, 4686th mtg, UN DOC S/RES/1455 (17 January 2003).

⁵⁶ For example, *Hamdan v Rumsfeld*, 548 US 557 (2006); *R (Gentle and another) v Prime Minister* [2008] 2 WLR 879; *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76; Guantanamo Bay Precautionary Measures Communication of March 12, 2002 from IACHR President Juan E. Mendez to US Secretary of State Colin Powell (2004) 11 IHRR 1037; *Al-Skeini and Others v United Kingdom* [2011] ECHR 1093 (7 July 2011); *Al-Jedda v United Kingdom* [2011] ECHR 1092 (7 July 2011); *Ameziane v United States*, PM 211/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.134, doc. 5 rev. 1, Ch. III, [37] (2008). This last case was recently held to be admissible by the Inter-American Commission on Human Rights: see

demonstrates the willingness of the human rights movement to resort to existing principles and avenues of enforcement to challenge alleged violations. In this context it could be argued that, rather than heralding the end of international human rights law as we know it, the events of 2001 and their aftermath highlighted the relevance of the legal principles in combating alleged violations.

(b) Australia and international human rights law

The history of the adoption and implementation of international human rights law in Australia is fraught with paradoxes. The Commonwealth Constitution contains few specific rights protections⁵⁷ and, following the Federal Government's response to the National Consultation on Human Rights, it is clear that there is no prospect of a Charter of Rights being implemented at the federal level in the near future.⁵⁸ Despite these lacunae, Australia actively participates in international processes and institutions for rights protection and has ratified the major human rights treaties.⁵⁹ Australia has also been willing to subject itself to some international procedures, including the individual petition procedure under the International Covenant for Civil and Political Rights, although the response to the views of the Human Rights Committee has not always been enthusiastic.⁶⁰ In this respect, Australia's attitude to international human rights law has been described as 'Janus-faced'⁶¹ – while successive governments have been willing to be bound by international instruments, there is less enthusiasm when it comes to transposing all of the obligations contained in these treaties into domestic law.⁶²

In the early years of the UN, Australia was actively involved in the drafting of the UDHR with HV Evatt proposing the establishment of an International Court of Human Rights to enforce compliance with the Declaration.⁶³ Despite this proposal, Australia's initial enthusiasm for the UN as a body to consider human rights violations has been described as a 'short-lived affair'.⁶⁴ Annemarie Devereux, in

Ameziane v United States, Admissibility Report 17/12, Petition-900-08, Inter-Am. C.H.R., OEA/Ser.L/V/II.144, doc. 21 (2012).

57 For a critical review of Australia's express and implied constitutional rights, see A Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29.

58 See n 69 and accompanying text.

59 Australia is a party to the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention Against Torture, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, and Convention on the Rights of Persons with Disabilities.

60 See S Joseph, 'The Howard Government's Record of Engagement with the International Human Rights System' (2008) 27 *Aust YBIL* 45, 49–53.

61 H Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002) 56.

62 *Ibid.* Charlesworth notes that Australia has implemented obligations in relation to non-discrimination on the grounds of race and sex, however, such implementation is incomplete and subject to legislative amendment.

63 See discussion in A Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966* (2005) 180–82.

64 *Ibid.* 231.

her study of Australia's human rights policies during the drafting of the International Bill of Rights points to fluctuations in Australia's approach to human rights in the 20 years after 1946 and a lack of consensus in Australia's understanding of the values that constitute human rights.⁶⁵ For example, while Australia was initially at 'the forefront of efforts to recognise and protect social rights on an equal basis with civil and political rights',⁶⁶ over the years this support flagged and was replaced by a desire to view the two sets of rights separately.⁶⁷ Furthermore, while Australia forcefully supported efforts to require states to recognise rights in their fundamental laws, once more this stance 'was not long-lived', not least due to the difficulties that Australia faced in amending its own Constitution.⁶⁸ Australia's lack of enthusiasm for entrenching human rights in these early years was replayed in 2010 when the Rudd Government rejected a recommendation in the report of the National Human Rights Consultation that Australia should adopt a federal human rights Act.⁶⁹ These events demonstrate that it cannot be assumed that Australia has always held a consistent attitude to the implementation of all aspects of international human rights law, either prior to or after 2001.

When considering Australia's human rights record post-2001, concerns have been raised about anti-terrorism legislation and the use of control orders,⁷⁰ the mandatory detention of asylum seekers,⁷¹ the excision of islands from Australia's migration zone,⁷² offshore processing of refugee applicants,⁷³ and the Howard Government's response to the trial of David Hicks before a US Military Commission.⁷⁴ In relation to this last example, the report of the independent observer for the Law Council of Australia at David Hicks' trial directly linked the Australian Government's support for the Hicks' trial before the flawed Military Commission process to the 'fundamental premise that since 11 September 2001, a

65 Ibid 7.

66 Ibid 30.

67 Ibid 57.

68 Ibid 147.

69 Attorney-General's Department, *Australia's Human Rights Framework* (2010) 1 <<http://www.ag.gov.au/>>. The recommendation is located in National Human Rights Consultation, *National Human Rights Consultation Report* (2009) xxxiv <http://www.humanrightsconsultation.gov.au/Report/Documents/NHRC_Report.pdf>.

70 Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008) 4–5 <http://humanrights.gov.au/pdf/legal/publications/counter_terrorism.pdf>; Australian Lawyers for Human Rights, *Submission to the International Commission of Jurists Eminent Jurists' Panel: Terrorism, Counter-Terrorism and Human Rights* (2006) <www.alhr.asn.au>.

71 Human Rights and Equal Opportunity Commission, *A Last Resort? The National Inquiry into Children in Immigration Detention* (2004) <<http://humanrights.gov.au/>>.

72 M Foster and J Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's 'Excised' Territory' (2011) 23 *International Journal of Refugee Law* 583.

73 Australian Human Rights Commission, *Immigration Detention and Offshore Processing on Christmas Island* (2009) <<http://humanrights.gov.au/>>.

74 L Lasry, *The United States v David Matthew Hicks – Final Report of the Independent Observer for the Law Council of Australia, Guantanamo Bay, Cuba* (2011) 4 <<http://www.lawcouncil.asn.au/>>.

different and diminished criminal justice paradigm is necessary to deal with international terrorism' and the 'nonsensical' and 'dangerous' belief that individual rights 'can be compromised whenever the Executive of a Government considers it necessary.'⁷⁵ Nonetheless, not all actions can be directly attributed to the events of 2001. In the field of refugee law, while legislation excising certain islands from the migration zone and enabling the offshore processing of refugee applicants ('the Pacific solution') can be ascribed to the arrival of the M/V Tampa, mandatory detention has been part of Australian policy since 1992. One of the most controversial parts of this policy, the mandatory detention of children, was in place well before September 2001.⁷⁶ In relation to Australia's legislative and executive actions directly responding to the events of September 11, including the enactment of counterterrorism legislation, the government's reaction was not radically different to past responses to threats to national security. In this respect Devereux draws parallels between Australia's legislative response to threats to national security post-2001 and its willingness to countenance measures restricting rights in order to combat the threat of communism in the 1950s.⁷⁷ While the threat was different, the response was similar.

Finally, many issues with consequences for Australia's approach to international human rights law in the last decade cannot be attributed to the events of August and September 2001. Two issues stand out in this respect: the Howard Government's reaction to criticisms made by UN treaty bodies and the position of indigenous Australians. Following negative comments by the Committee on the Elimination of Racial Discrimination in 2000 regarding some aspects of Australia's laws, the Foreign Minister, Alexander Downer, announced that 'the Government was appalled at the blatantly political and partisan approach taken by the ... Committee' and would review its relations with the UN committee system.⁷⁸ After this outburst, Australia failed to address concerns raised by UN human rights committees in their Concluding Observations on various reports submitted by Australia during the last decade.⁷⁹ Although reform of the committee system was considered necessary, Sarah Joseph writes that the level of the Australian government's response was unjustified.⁸⁰ In relation to indigenous rights, much has been written about the application of international human rights law to indigenous Australians, not least in relation to the Intervention in the Northern Territory and the suspension of the Racial Discrimination Act 1975 (Cth). There is no doubt of the importance of these issues and their enduring nature. But for the purposes of this article, it is relevant to note that indigenous rights issues have engaged the attention of human rights lawyers in Australia for many years and such issues (including the Intervention in

⁷⁵ Ibid.

⁷⁶ For an historical perspective on Australia's response to refugees see K Neumann, 'Providing a "home for the oppressed"? Historical Perspectives on Australian Responses to Refugees' (2003) 9 *Australian Journal of Human Rights* 14.

⁷⁷ Devereux, above n 63, 243.

⁷⁸ Minister for Foreign Affairs (Cth) 'Government to Review UN Treaty Committees', (Media Release, 30 March 2000) <<http://www.foreignminister.gov.au/releases/2000/fa0242000.html>>

⁷⁹ See discussion in Joseph, above n 60, 58.

⁸⁰ Ibid 56.

the Northern Territory, the initial failure to vote for the adoption of the UN Declaration on the Rights of Indigenous Peoples, the report of the national enquiry into the stolen children, and mandatory sentencing) are unrelated to the events of 2001 and the government's response to those events.⁸¹ While it may be tempting to connect all government actions with potentially adverse consequences for human rights to the events of 2001 and their aftermath (particularly in an article which asks the question whether the events of 2001 changed the world of human rights law), this would be to overstate the impact of those events.

Contrary to the rather negative picture of the application of international human rights law in Australia painted above, it is important to recognise that there has been substantial progress in a number of areas in the last decade. One state and one territory have enacted human rights legislation,⁸² Australia ratified the Convention on the Rights of Persons with Disabilities, an apology to the Stolen Generation was given in the Federal Parliament, and a wide-ranging consultation on human rights was held⁸³ (although some lawyers may have wished for a different response from the government to the recommendations contained in the national consultation's report). In addition, the courts have proved robust in response to Commonwealth arguments that it was inappropriate for the judiciary to consider executive actions arising from the detention of two Australians in Guantánamo Bay.⁸⁴ Although Australia's anti-terrorism legislation has been criticised by human rights advocates, by adopting legislation to counter the threat of a terrorist attack in Australia, the Federal Government was fulfilling its responsibilities under international human rights law to protect the lives of its citizens.⁸⁵ A High Court challenge to the constitutionality of aspects of the counterterrorism legislation was unsuccessful,⁸⁶ but the fact that such a challenge was brought demonstrates the willingness to use legal avenues to challenge post-September 11 legislative measures (even if such challenges were not brought on the basis of human rights law principles in Australia).⁸⁷

This very brief examination of international human rights law in Australia demonstrates that it is difficult to definitively conclude that the events of September

81 For a discussion linking Australia's approach to anti-terrorism laws with the curtailment of indigenous rights in the past see M Davis and N Watson, "'It's the same old song": Draconian Counter-Terrorism laws and the Déjà vu of Indigenous Australians' (2006) 5 *Borderlands e-journal*.

82 Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).

83 National Human Rights Consultation above n 69.

84 In two cases the Federal Court and the Full Court of the Federal Court rejected the Commonwealth's argument that the Act of State doctrine prevented the courts considering matters involving Hicks (in relation to his detention in Guantánamo Bay) and Habib (concerning allegations that officers of the Commonwealth had aided, abetted and counselled treatment which would amount to a criminal offence under the Crimes (Torture) Act 1988 (Cth)). See *Hicks v Ruddock* (2007) 156 FCR 574; *Habib v Commonwealth* (2010) 183 FCR 62.

85 H Duffy, *The 'War on Terror' and the Framework of International Law* (2005) 304.

86 *Thomas v Mobraay* [2007] HCA 33.

87 For a discussion of human rights principles in this context see judgment of Kirby J, *Thomas v Mobraay* [2007] HCA 33, especially [379]–[382].

11 and their aftermath significantly impeded the implementation of international human rights law in Australia as a whole. Much progress has been attained in the last decade, however, there have also been significant challenges. Some policies subjected to critical comment by human rights lawyers, including Australia's response to the comments by the Committee on the Elimination of Racial Discrimination and the presence of children in immigration detention centres arose from circumstances predating the war on terror. Other legislative actions can be directly traced to Australia's response to either the arrival of the *M/V Tampa* or the attacks on the United States. Much of the decade was dominated by the Howard government (in power until 2007), a government whose record was not 'rated highly' when engaging with the international human rights system, although progress was made in some areas.⁸⁸ Leaving aside policies which can be directly attributed to the arrival of the *M/V Tampa* and the terrorist attacks on the United States, the question remains whether Australia's record would have been any different. By returning to Devereux's study of Australian policies between 1946 and 1966, it is possible to demonstrate many similarities between Australia's approach to human rights law in the decade post-2001 with actions and policies in prior decades.

III. Scholarship on Human Rights Law

This overview of some developments in international human rights law and its application in Australia has suggested that the events of 2001 have not resulted in an end to the human rights era. It also demonstrates that it may be wrong to suggest that there was a halcyon 'human rights era' prior to 2001, which was superseded or obliterated by the war on terror. In order to further assess the impact of the events of 2001 on human rights law, this article will now turn to human rights scholarship, particularly legal scholarship. It is based on the premise that if the events of 2001 had a significant impact on international human rights law then we would expect to see a concomitant change in literature in this field. This change could be represented in a number of ways, but most notably through an increase in scholarship that can be directly traced to either the consequences of the terrorist attacks on September 11 or the arrival of the *M/V Tampa* in Australia. In order to identify such scholarship this article will concentrate on five issues: the prohibition on torture, liberty and security of the person and detention practices, the application of human rights law to non-state actors (for example, terrorist organisations), the relationship between human rights law and international humanitarian law, and the extraterritorial application of human rights law. The inclusion of the last two issues relates to the deployment of troops in Afghanistan (and Iraq) post-September 2001 and subsequent debates concerning the application of human rights law in armed conflict and the intersection of human rights law with international humanitarian law. Other relevant scholarship includes discussions of national security and

⁸⁸ Joseph, above n 60, 67.

terrorism in the context of human rights principles, refugee law and practice in Australia, and discrimination on the basis of race and religion.⁸⁹

(a) General comments on legal scholarship

A survey of legal monographs and edited collections published since 2001 reveals that there has been a plethora of books and book chapters devoted to the topics of counterterrorism measures and human rights⁹⁰ and the prohibition on torture.⁹¹ The relationship between international humanitarian law and human rights law during armed conflict and occupation,⁹² and the extraterritorial application of international human rights law⁹³ have also been the subjects of book-length studies published in the last decade. In relation to the literature on terrorism and international human rights law specifically, many writers highlight two points: that terrorism is not a new challenge for international law, and second, that terrorism is a crime that nations have legitimate security goals in eradicating in order to protect their citizens. Nonetheless, when discussing the impact of September 11 on international human rights law, much of the literature concentrates on alleged violations committed by governments, including Western governments, in the fight against terrorism and the human rights implications of counterterrorism legislation. When reading human rights scholarship published post-September 11, Kenneth Cmiel's comment in his

⁸⁹ Articles in this last group may include those debating issues such as racial profiling at the point of immigration.

⁹⁰ For example, Duffy, above n 85; P V Kessing, 'Terrorism and Human Rights' in S Lagoutte, H Sano and P Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (2007) 133; 'Part IV— Human Rights and Terrorism: Is a Trade-off Necessary' in A Lynch, E MacDonald, G Williams (eds), *Law and Liberty in the War on Terror* (2007); N LaViolette and C Forcese (eds), *The Human Rights of Anti-Terrorism* (2008); C Gearty, *Essays on Human Rights and Terrorism: Comparative Approaches to Civil Liberties in Asia, the EU and North America* (2008); E Massimino, 'Fighting from Strength: Human Rights and the Challenge of Terrorism' in W F Schulz (ed), *The Future of Human Rights: US Policy for a New Era* (2008) 23; A Sambei, A Du Plessis and M Polaine, *Counter-Terrorism Law and Practice: An International Handbook* (2009); Conte, above n 4; M L Volcansek and J F Stack Jr (eds), *Courts and Terrorism: Nine Nations Balance Rights and Security* (2011).

⁹¹ K J Greenberg and J L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005); J Szwarc, *Perspectives on Torture: The Law, the Effects, the Debate* (2007); S Joseph, 'Torture: What it is, Will it Work and Can it be Justified?' in A Lynch, E MacDonald, G Williams (eds), *Law and Liberty in the War on Terror* (2007); P Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (2008); N Rodley and M Pollard, *The Treatment of Prisoners Under International Law* (2009).

⁹² For example, O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (2011); R Arnold and N Qu nivet (eds), *International Humanitarian Law and International Human Rights Law: Towards a New Merger in International Law* (2008); R Provost, *International Human Rights Law and Humanitarian Law* (2002).

⁹³ F Coomans and M T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); M Gibney and S Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (2010); M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011).

2004 analysis of such literature appears apt: '[t]he optimism that underscored so much of the 1990s writing now appears to be past'.⁹⁴ However, Cmiel underlines that this is not the first time that this has occurred, citing the 1950s as a period when the advent of the Cold War and decolonisation 'stopped the nascent drive for international human rights law in its tracks for the next fifty years'.⁹⁵ Events in the past have diminished human rights activism and the optimism displayed in scholarship in this field, and yet enthusiasm for human rights has re-emerged.

(b) An analysis of five human rights journals

As well as these book-length studies, many other reports and articles have debated the human rights issues relevant to this study. Rather than list this voluminous literature, the remainder of this discussion on human rights scholarship post-2001 will concentrate on articles appearing in five specialist human rights journals. The aim is to determine whether the events of September 11 (and in the case of Australia, the arrival of the M/V *Tampa*) have influenced this scholarship to the extent that these events, and the associated legal issues resulting from those events identified above, dominate over other human rights problems featuring in these journals. The five journals chosen for study are the *Australian Journal of Human Rights*, the *Human Rights Law Review*, the *Harvard Human Rights Journal*, the *South African Journal on Human Rights* and the *Human Rights Quarterly*. It is acknowledged that these publications only represent five journals out of the many human rights publications in existence and that human rights scholars and activists may publish elsewhere (in generalist journals or in specific international law journals) on international human rights law. These journals have been chosen on the basis that they provide a sample across four continents and include law reviews as well as journals with an interdisciplinary focus. Therefore, they should provide a snapshot of the extent to which scholarship may have changed as a result of the events of 2001. Apart from the *Human Rights Law Review* (which commenced publication in the United Kingdom in 2001), this analysis will concentrate on a 16-year period (1995–2010) to determine whether the events of 2001 have significantly changed the content of these journals.⁹⁶

As a starting point, the terrorist attacks in the United States, and the consequences of those attacks, did not significantly affect the scholarship published in the *Australian Journal of Human Rights* between 1995 and 2010. Prior to 2002, the journal contained pieces analysing a variety of themes, including refugees,⁹⁷

⁹⁴ K Cmiel, 'The Recent History of Human Rights' (2004) 109 *American Historical Review* 117, 135.

⁹⁵ Ibid.

⁹⁶ In the 16-year period under review approximately 1568 articles, comments, case notes and current developments were published in the five journals (for ease of reference these are referred to generically as 'articles' in this study). Between 2002 and 2010, approximately 950 articles were published in the five journals. This analysis excludes book reviews, compilations of statistics from courts or general overviews of case law from international or regional courts.

⁹⁷ N Poynder, 'The Incommunicado Detention of Boat People: A Recent Development in Australia's Refugee Policy' (1997) 3(2) *Australian Journal of Human Rights* 53;

children's rights⁹⁸ and indigenous rights.⁹⁹ Contributions tended to concentrate on the application of human rights in Australia, although articles also covered issues arising in other countries.¹⁰⁰ In terms of the five issues of interest to this study, in the 16-year period under review one substantial article dealt with torture (in the context of non-refoulement)¹⁰¹ and one journal issue was devoted to discussing human rights in the administration of justice, including detention.¹⁰² However, both were published prior to 2001 and therefore their contents are unrelated to the human rights implications of the war on terror. After 2002, one article in the *Australian Journal of Human Rights* dealt with David Hicks (in relation to his application for UK nationality)¹⁰³ and two articles discussed Australia's response to the attacks in the US and federal anti-terrorism legislation in the context of the debate concerning a bill of rights.¹⁰⁴ Authors writing on non-state actors and international human rights law concentrated on corporate responsibility for human rights violations,¹⁰⁵ with no attention being devoted to the potential responsibility of other non-state actors (for example, armed opposition groups and terrorist organisations). Despite the fact that Australian troops were deployed in both Afghanistan and Iraq, the application of human rights law in armed conflict and the relationship between international humanitarian law and human rights law did not receive any attention in this journal. Thus, apart from three contributions, the tables of contents of the

S Taylor, 'Should Unauthorised Arrivals in Australia have Free Access to Advice and Assistance' (2000) 6(1) *Australian Journal of Human Rights* 34.

⁹⁸ For example, see articles in the following special issue: (1996) 2(2) *Australian Journal of Human Rights*; M Jones, 'Myths and Facts Concerning the Convention on the Rights of the Child in Australia' (1999) 5(2) *Australian Journal of Human Rights* 126.

⁹⁹ For example, D Miller, 'Knowing Your Rights: Implications of the Critical Legal Studies Critique of Rights For Indigenous Australians' (1991) 5(1) *Australian Journal of Human Rights* 48; G Nettheim, 'Reconciliation: Challenges for Australian Law' (2001) 7(1) *Australian Journal of Human Rights* 47; A Cody, 'Williams v The Minister, Aboriginal Land Rights Act 1983' (2001) 7(1) *Australian Journal of Human Rights* 155.

¹⁰⁰ For example, K Sangster, 'Truth Commissions: The Usefulness of Truth-telling' (1999) 5(1) *Australian Journal of Human Rights* 136; K Keith, 'International Humanitarian Fact-finding Commission: Its Potential' (1999) 5(2) *Australian Journal of Human Rights* 101; S Bouwhuis, 'Kosovo: The Legality of Intervention?' (2000) 6(2) *Australian Journal of Human Rights* 57.

¹⁰¹ J Kinslor, 'Non-Refoulement and Torture: The Adequacy of Australia's Laws and Practices in Safeguarding Asylum-seekers From Torture' (2000) 6(2) *Australian Journal of Human Rights* 161. In 2011 (outside the 16-year period of review) another article on torture appeared in this journal: S Tully 'Sharpening the Blade: A New Law on Torture for Australia?' (2011) 17(1) *Australian Journal of Human Rights* 1.

¹⁰² See articles published in (1997) 3(2) *Australian Journal of Human Rights*.

¹⁰³ N Klein and L Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and his Dual Nationality' (2007) 13(1) *Australian Journal of Human Rights* 1.

¹⁰⁴ R McClelland, 'How is a Bill of Rights Relevant Today?' (2003) 9(1) *Australian Journal of Human Rights* 11; G Williams, 'National Security, Terrorism and Bills of Rights' (2003) 9(1) *Australian Journal of Human Rights* 263.

¹⁰⁵ For example, J Clough, 'Not-so Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses' (2005) 11(1) *Australian Journal of Human Rights* 1; A McBeth and S Joseph, 'Same Words, Different Language: Corporate Perceptions of Human Rights Responsibilities' (2005) 11(2) *Australian Journal of Human Rights* 95.

Australian Journal of Human Rights leave a reader with the overwhelming impression that the application of international human rights law in Australia has not been seriously affected by the terrorist attacks of September 11 or Australia's response to those attacks.

However, the same comment is not apt to describe scholarship following the arrival of the M/V *Tampa*. As indicated above, prior to 2002 the position of refugees in Australia was discussed in the *Australian Journal of Human Rights*. After this date the rights of refugees and associated issues again featured strongly, with a special issue in 2002 devoted to papers from a 2001 conference to commemorate the fiftieth anniversary of the Refugee Convention. Although articles in this special edition cover a range of refugee issues, specific contributions dealt with the compatibility of Australia's response to the arrival of the M/V *Tampa* with its obligations under the Refugee Convention and questioned Australia's concept of national borders.¹⁰⁶ In subsequent years, Australia's policies on refugees, including the excision of Christmas Island from Australia's migration zone and the human rights implications of the psycho-social harm caused by Temporary Protection Visas have received attention.¹⁰⁷ Symposia in both 2004 and 2006 featured articles on refugee issues, including detention and citizenship.¹⁰⁸ These articles (25 in total, or approximately 20 per cent of the contributions published between 2002 and 2010) constitute a strong body of literature critiquing Australia's policies and legislation with respect to refugees, demonstrating the significance of the arrival of the M/V *Tampa* (and refugee law more generally) to the application of human rights law in Australia. It is also important to put this literature in context — in 2002 and subsequent years, authors dealt with a range of other topics, including the domestic implementation of human rights,¹⁰⁹ health and human rights¹¹⁰ and the rights of disabled persons.¹¹¹ Thus, the large number of articles in the *Australian Journal*

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- ¹⁰⁶ F Feld, 'The Tampa Case: Seeking Refuge in Domestic Law' (2002) 8(1) *Australian Journal of Human Rights* 157; J Stratton and S McCann, 'Staring into the Abyss: Confronting the Absence of Decency in Australian Refugee Law and Policy Development' (2002) 8(1) *Australian Journal of Human Rights* 141; S M Tascón, 'Refugees and Asylum-seekers in Australia: Border-crossers of the Postcolonial Imaginary' (2002) 8(1) *Australian Journal of Human Rights* 125.
- ¹⁰⁷ E Della Torre, 'A Discussion of the Recent Excision of Christmas Island From Australia's Migration Zone in the Light of Australia's International Refugee Obligation of Non-refoulement' (2003) 9(2) *Australian Journal of Human Rights* 123; S Taylor, 'The Human Rights Implications of the Psycho-Social Harm Caused by Australia's Temporary Protection Regime' (2005) 11(1) *Australian Journal of Human Rights* 233.
- ¹⁰⁸ See (2004) 10(1) *Australian Journal of Human Rights*; (2006) 12(1) *Australian Journal of Human Rights*.
- ¹⁰⁹ See special edition: A Bill of Rights for Australia? (2003) 9(1) *Australian Journal of Human Rights*.
- ¹¹⁰ For example, D Tarantola, A Byrnes, M Johnson, L Kemp, A B Zwi and S Gruskin, 'Human Rights, Health and Development' (2007) 13(2) *Australian Journal of Human Rights* 1; L Hallgath and D Tarantola, 'A Rights-Based Approach to the Assessment of Global Health Initiatives' (2007) 13(2) *Australian Journal of Human Rights* 157.
- ¹¹¹ K Soldatic and B Pini 'The three Ds of welfare reform: disability, disgust and deservingness' (2009) 15(1) *Australian Journal of Human Rights* 77; R Sahlin, 'Legislating Discrimination Protection for Persons with Disabilities in Australia and

published after 2002 on the consequences of Australia's executive and legislative responses to arrivals by boat¹¹² were accompanied by the discussion of other human rights issues relevant to Australia.

Returning to the terrorist attacks on September 11 and the subsequent war on terror: how does the lack of discussion of these events and their consequences in the *Australian Journal of Human Rights* compare with the situation in journals published overseas? Certainly we would expect to find the greatest number of contributions in United States and United Kingdom publications on the basis that both countries have been particularly affected by terrorist events. In the United Kingdom, the *Human Rights Law Review* reflects these concerns with authors discussing the extra-territorial scope of human rights treaties,¹¹³ detention at Guantánamo Bay,¹¹⁴ the Security Council's and the United Kingdom's anti-terrorist measures,¹¹⁵ the prohibition on torture and the practice of extraordinary rendition,¹¹⁶ and the abuse of detainees.¹¹⁷ However, not all contributions covering issues such as torture necessarily dealt with circumstances related to the war on terror.¹¹⁸ While articles discussing issues relevant to the September 11 attacks do

Sweden: A Comparative Analysis' (2007) 13(2) *Australian Journal of Human Rights* 209; F Gibson, 'Article 13 of the Convention on the Rights of Persons with Disabilities – A Right to Legal Aid?' (2010) 15(2) *Australian Journal of Human Rights* 123.

- 112 The significance of Australia's response to the arrival of the M/V *Tampa* is reinforced by the fact that the only article focussing on Australia in the *Human Rights Quarterly* between 2002 and 2010 is on the *Tampa*: see Cécilia Bailliet, 'The *Tampa* Case and its Impact on Burden Sharing at Sea' (2003) 25 *Human Rights Quarterly* 741.
- 113 See M Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 3 *Human Rights Law Review* 411; H King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521.
- 114 R Murphy, 'Prisoner of War Status and the Question of the Guantánamo Bay Detainees' (2003) 3 *Human Rights Law Review* 257; M Happold, 'The Detention of Al-Qaeda Suspects at Guantanamo Bay: United Kingdom Perspectives' (2004) 4 *Human Rights Law Review* 57; B D Tittmore, 'Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism' (2006) 6 *Human Rights Law Review* 203; D Jenkins, 'Habeas Corpus and Extraterritorial Jurisdiction after *Boumediene*: Towards a Doctrine of "Effective Control" in the United States' (2009) 2 *Human Rights Law Review* 306.
- 115 E J Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights' (2007) 2 *Human Rights Law Review* 371; H Keller and A Fischer, 'The UN Anti-terror Sanctions Regime Under Pressure' (2009) 2 *Human Rights Law Review* 257; S Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5 *Human Rights Law Review* 403; S Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues' (2006) 6 *Human Rights Law Review* 416.
- 116 S Joseph, 'Rendering Terrorists and the Convention Against Torture' (2005) 5 *Human Rights Law Review* 339; T Poole, 'Recent Developments in the "War on Terrorism" in Canada' (2007) 3 *Human Rights Law Review* 633.
- 117 N Whitty, 'Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa' (2010) 10 *Human Rights Law Review* 689.
- 118 For example, M Happold, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77;

not represent the majority of pieces published in the first ten years of the *Review's* existence, they certainly constitute a substantial contribution.

On the other side of the Atlantic, unsurprisingly, in the ten-year period post-2001 the two journals published in the United States, the *Harvard Human Rights Journal* and the *Human Rights Quarterly*, included a number of contributions discussing human rights and terrorism, national security and counterterrorism efforts,¹¹⁹ extraordinary rendition,¹²⁰ discrimination against Muslim minorities,¹²¹ and detention in the war on terror.¹²² Prior to 2002, there were very few contributions on the law relating to either detention or torture in either journal. In the period 1995 to 2001 one substantive article in the *Harvard Human Rights Journal* dealt with the Convention against Torture (with only one paragraph in that article devoted to the topic, 'Torture within the United States')¹²³ and one article in

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- M D Evans and C Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture' (2004) 4 *Human Rights Law Review* 19.
- 119 M Robinson, 'Making Human Rights Matter: Eleanor Roosevelt's Time Has Come' (2003) 16 *Harvard Human Rights Journal* 1; J Shattuck, 'Religion, Rights, and Terrorism' (2003) 16 *Harvard Human Rights Journal* 183; W W Burke-White, 'Human Rights and National Security: The Strategic Connection' (2004) 17 *Harvard Human Rights Journal* 249; Hoffman, above n 1; R Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29 *Human Rights Quarterly* 489.
- 120 D Weissbrodt and A Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 *Harvard Human Rights Journal* 123. A heated debate also emerged in the *Human Rights Quarterly* between Tom Farer and Jean Bethke Elshtain regarding the war on terrorism and the 'appropriation of human rights' by the left (and right) in the United States: T Farer, 'Un-just War Against Terrorism and the Struggle to Appropriate Human Rights' (2008) 30 *Human Rights Quarterly* 356; J B Elshtain, 'Response to Tom Farer's Un-just War Against Terrorism and the Struggle to Appropriate Human Rights' (2008) 30 *Human Rights Quarterly* 758; T Farer, 'Still Searching for Engagement: A Comment on Professor Jean Bethke Elshtain's Response to Un-just War Against Terrorism and the Struggle to Appropriate Human Rights' (2008) 30 *Human Rights Quarterly* 767.
- 121 J Rehman, "'War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multi-Culturalism in the Aftermath of the London Bombings' (2007) 29 *Human Rights Quarterly* 831.
- 122 A Chirinos, 'Finding the Balance Between Liberty and Security: The Lords' Decision on Britain's Anti-Terrorism Act' (2005) 18 *Harvard Human Rights Journal* 265; A M Suleman, 'Detainee Treatment Act of 2005' (2006) 19 *Harvard Human Rights Journal* 257; M Nowak, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28 *Human Rights Quarterly* 809; J Mayerfield, 'Playing by Our Own Rules: How US Marginalisation of International Human Rights Law Led to Torture' (2007) 20 *Harvard Human Rights Journal* 89; K Riggs, R Blakely and J Marwaha, 'Prolonged Mental Harm: The Tortuous Reasoning Behind the New Standard for Psychological Abuse' (2007) 20 *Harvard Human Rights Journal* 263; D J R Frakt, 'Closing Argument at Guantanamo: The Torture of Mohammed Jawad' (2009) 22 *Harvard Human Rights Journal* 1.
- 123 W P Nagan and L Atkins, 'The International Law of Torture: From Universal Prescription to Effective Application and Enforcement' (2001) 14 *Harvard Human Rights Journal* 87.

the *Human Rights Quarterly* focussed on detention without trial (in Tanzania).¹²⁴ Additionally, an article published prior to 2002, citing a diverse range of state practice, examined national security (in the context of freedom of expression).¹²⁵ The articles published in this earlier period leave the reader with the impression that these ‘types’ of violations occurred elsewhere (outside the United States). As was the case in the *Human Rights Law Review*, not all the contributions published after 2002 on issues such as torture were ‘war on terror’ specific in the two US journals.¹²⁶ Nonetheless, contributions in both journals moved from a position whereby these abuses occur ‘elsewhere’, to one in which the United States is intrinsically involved in such violations.

Of the five journals under consideration, the events of September 2001 had the least impact on the scholarship published in the *South African Journal on Human Rights*. Although submissions on terrorism and torture appeared in the period 2002 to 2010,¹²⁷ such contributions represented a small minority in a publication which concentrates on issues specific to South Africa.¹²⁸ Instead, there appears to be a remarkable consistency between the two periods (1996–2001) and (2002–2010) in the issues considered pertinent to the protection of human rights in South Africa. Consequently, in both time periods articles appear on the constitutional protection of rights and constitutional remedies,¹²⁹ property rights,¹³⁰ the rights of the

¹²⁴ C M Peter, ‘Incarcerating the Innocent: Preventative Detention in Tanzania’ (1997) 19 *Human Rights Quarterly* 113.

¹²⁵ S Coliver, ‘Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information’ (1998) 20 *Human Rights Quarterly* 12.

¹²⁶ For example, H Forbes Smith and M Freeman, ‘The Mandatory Reporting of Torture by Detention Center Officials: An Original Proposal’ (2005) 27 *Human Rights Quarterly* 327; T Kelly, ‘The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty’ (2009) 31 *Human Rights Quarterly* 777.

¹²⁷ M Kirby, ‘Judicial Review in a Time of Terrorism – Business as Usual’ (2006) 22 *South African Journal on Human Rights* 21; M Du Plessis, ‘Removals, Terrorism and Human Rights – Reflections on Rashid’ (2009) 25 *South African Journal on Human Rights* 353; L Muntingh and L Fernandez, ‘Review of Measures in Place to Effect the Prevention and Combating of Torture with Specific Reference to Places of Detention in South Africa’ (2008) 24 *South African Journal on Human Rights* 123; A Cachalia, ‘Counter-Terrorism and International Cooperation against Terrorism – An Ellusive Goal: A Perspective’ (2010) 26 *South African Journal on Human Rights* 510.

¹²⁸ The *South African Journal* ‘welcomes submissions of interest to a South African audience’: Guide to Contributors, *South African Journal on Human Rights*.

¹²⁹ Examples of pre-2002 articles include: J de Ville, ‘The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution’ (1995) 11 *South African Journal on Human Rights* 264; R Lyster, ‘Mediating Constitutionally Protected Rights Disputes: Some Caveats and Recommendations’ (1996) 12 *South African Journal on Human Rights* 230; H S Axam, ‘If The Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail’ (2001) 17 *South African Journal on Human Rights* 320. Post-2002 articles include I J Kroeze, ‘God’s Kingdom in the Law’s Republic: Religious Freedom in South African Constitutional Jurisprudence’ (2003) 19 *South African Journal on Human Rights* 469; M Swart, ‘Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor’ (2005) 21 *South African Journal on Human Rights* 215.

child,¹³¹ the promotion and protection of economic and social rights,¹³² and gay and lesbian rights.¹³³ A discussion of fair trial rights in criminal (and civil trials) is included in articles published in the *South African Journal*, both before and after 2001, but the post-2001 publications do not take as their focus fair trial rights in the context of terrorist offences.¹³⁴ Furthermore, despite the presence of armed groups fighting in a number of African states in the relevant time period, as was the case

- ¹³⁰ Examples of articles published pre-2002 include A J van der Walt, 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' (1995) 11 *South African Journal on Human Rights* 169; R Keightley, 'The Impact of the Extension of Security of Tenure Act on an Owner's Rights to Vindicate Immovable Property' (1999) 15 *South African Journal on Human Rights* 277. Post-2002 articles include A J Van der Walt, 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law' (2002) 18 *South African Journal on Human Rights* 372; H Mostert, 'The Distinction between Deprivations and Expropriations and the Future of the "Doctrine" of Constructive Expropriations in South Africa' (2003) 19 *South African Journal on Human Rights* 167.
- ¹³¹ Examples of articles published pre-2002 include J Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 *South African Journal on Human Rights* 401; J Sloth-Nielsen and B van Heerden, 'The Child Care Amendment Act: Does it Improve Children's Rights in South Africa?' (1996) 12 *South African Journal on Human Rights* 649; S Pete, 'To Smack or Not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on Their Children' (1998) 14 *South African Journal on Human Rights* 430. Post-2002 publications include C Matthias and N Zaal, 'Hearing Only a Faint Echo: Interpreters and Children in Court' (2002) 18 *South African Journal on Human Rights* 350; S Rosa and M Dutschke, 'Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights' (2006) 22 *South African Journal on Human Rights* 224.
- ¹³² Examples of articles published pre-2002 include E de Wet, 'Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?' (1995) 11 *South African Journal on Human Rights* 1; S Lienbeneg, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359; S Lienbeneg, 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *South African Journal on Human Rights* 232. Post-2002 articles include D Newman, 'Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda' (2003) 19 *South African Journal on Human Rights* 189; D Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; special issue: Women and Social and Economic Rights (2009) 25 *South African Journal on Human Rights*.
- ¹³³ For examples of articles published pre-2002 see A Cockrell, 'Rainbow Jurisprudence' (1996) 12 *South African Journal on Human Rights* 1; M P Katz, 'Close Encounters of the Third Kind: Privacy, Equality and the Expression of Homosexual Preference' (1996) 12 *South African Journal on Human Rights* 308; articles focusing on same-sex marriage in (1996) 12 *South African Journal on Human Rights*. Post-2002 articles include K Williams, "'I Do" or "We Won't": Legalising Same Sex-Marriage in South Africa' (2004) 20 *South African Journal on Human Rights* 32; special issue: Sexuality and the Law' (2007) 23 *South African Journal on Human Rights*.
- ¹³⁴ For example, J Brickhill, 'The Right to a Fair Civil Trial: The Duties of Lawyers and Law Students to Act Pro Bono' (2005) 21 *South African Journal on Human Rights* 293.

with the *Australian Journal on Human Rights*, post-2001 discussion of the application of human rights law to non-state actors was confined to transnational corporations.¹³⁵ This leaves the impression that the events of 2001 were of little relevance to fundamental human rights problems in South Africa.

(c) Commentary on scholarship in five journals

This survey of articles reveals that of the 950 articles published in the five journals from 2002 to 2010, approximately¹³⁶ 76 (or 8 per cent) dealt directly or indirectly with the attacks of September 11, the consequences of the war on terror, or in the case of Australia, refugee issues arising from the arrival of the M/V *Tampa*. If the 25 articles in the *Australian Journal of Human Rights* on refugee and border protection issues are removed from this analysis, then the number of articles published on issues related to the war on terror constituted 5.5 per cent (51 of 925) of published articles. It is not surprising that the greatest concentration of scholarship on issues relevant to the war on terror is found in the three journals published in the United States and the United Kingdom given the impact of terrorist attacks in those two countries and their involvement in Iraq and Afghanistan. In this respect, articles on the war on terror constituted approximately 7.6 per cent (45 of 592) articles published in the *Human Rights Law Review*, the *Harvard Human Rights Journal* and the *Human Rights Quarterly*. On the other hand, only 1.3 per cent (3 of 235) of the articles published in the *South African Journal on Human Rights* between 2002 and 2010 dealt directly or indirectly with the war on terror. Within this data there are three lacunae in these publications worthy of further exploration: the lack of articles in the *Australian Journal of Human Rights* on issues relevant to the war on terror; the absence of scholarship dealing with the relationship between international humanitarian law and human rights law; and finally, the failure to consider the application of human rights law to non-state actors (apart from corporations).

Although there are only three articles published in the *Australian Journal of Human Rights* between 2002 and 2010 dealing with issues arising from the war on terror, numerous articles discussing Australia's counterterrorism legislation, including the use of control orders, have appeared in many other Australian law journals.¹³⁷ Very little of this scholarship focuses exclusively on the application of

¹³⁵ D Mzikenge Chirwa, 'The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law' (2006) 22 *South African Journal on Human Rights* 76.

¹³⁶ These figures are approximate as they include articles discussing issues arising from the war on terror, although they may also deal with other situations giving rise to similar human rights issues. This survey does not seek to distinguish between such articles in a way that a percentage can be allocated to the discussion of issues arising from the war on terror as distinct from other circumstances.

¹³⁷ For example, C Michaelsen, 'International Human Rights on Trial: The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275; S Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428; J von Doussa, 'Reconciling Human Rights and Counter-Terrorism: A Crucial Challenge' (2006) 13 *James Cook University Law Review* 104; P Fairall and W Lacey,

international human rights law in Australia.¹³⁸ Instead, much of the discussion takes one (or both) of two approaches: first, it analyses the compatibility of Australia's legislative response with constitutional or administrative law (with human rights law being a secondary analytical method); and second, it contrasts Australian legislative or judicial responses to responses in countries with bills of rights, such as the United Kingdom or Canada.¹³⁹ The lack of contributions in the *Australian Journal of Human Rights* on Australia's response to the war on terror may be explained by a number of different factors, not least the publication priorities of particular scholars. But it could also be due to the fact that the lack of legally enforceable human rights principles in Australia has meant that discussion of international human rights law in this context is necessarily secondary to the dominant constitutional law model. In such circumstances it may not be surprising that literature in this field has not been published in a journal exclusively devoted to human rights.¹⁴⁰

The second absence in the five journals is the lack of discussion of the relationship between international human rights law and international humanitarian law (although there is some discussion in the *Human Rights Law Review* of the application of international human rights law extra-territorially in armed conflict).¹⁴¹ Despite this absence, there is no shortage of literature on the application of human rights norms in armed conflict and the relationship between international human rights law and international humanitarian law elsewhere, particularly in journals specialising in international humanitarian law.¹⁴² Once

'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072; K Ewing and J Tham, 'Limitations of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31 *Melbourne University Law Review* 462; G Carne, 'Remedying the Past or Losing International Human Rights in Translation? "Comprehensive" Responses to Australian National Security Legislation Reviews' (2009) 13 *University of Western Sydney Law Review* 37; A Lynch, N McGarrity and G Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1; S D Bachmann and M Burt, 'Control Orders Post 9-11 and Human Rights in the United Kingdom, Australia and Canada: A Kafkaesque Dilemma?' (2010) 15 *Deakin Law Review* 131; M Caristo, 'Secretary of State for the Home Department v AF: A Lesson for Australia' (2010) 32 *Sydney Law Review* 693; K Hardy, 'Bright Lines and Open Prisons: The Effect of the Statutory Human Rights Instrument on Control Order Regimes' (2011) 36(1) *Alternative Law Journal* 4. See also the special edition on detention without trial in (2005) 9 *University of Western Sydney Law Review*.

¹³⁸ Joseph, above n 137, is an exception in this respect in that it concentrates solely on Australia's obligations under human rights law.

¹³⁹ For example, Caristo, above n 137; Bachmann and Burt, above n 137; and Hardy, above n 137.

¹⁴⁰ The *Australian Journal of Human Rights* is described as a journal 'devoted to the publication of articles, commentary and book reviews about human rights development in Australia, the Asia-Pacific region and internationally': See Australian Human Rights Centre, www.ahrcentre.org/publications/ajhr.

¹⁴¹ See above n 113.

¹⁴² As well as the book-length studies listed at n 92, the following are a small selection of articles written on this topic: K Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 *American Journal of International Law* 1; N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *International Review of the Red Cross* 737; M J Kelly,

more, the decision to publish in specific journals will depend on the scholars' and journals' priorities. Some of the literature in this field is critical of the application of international human rights law standards in armed conflict where international humanitarian law is seen as the more appropriate regime. However, a feature of much of the scholarship on the role of human rights during armed conflict is that it does not seek to argue for new principles of human rights law, but rather seeks to apply existing principles to new situations (armed conflict). This literature suggests a trend that I will label a 'secondary' impact of the events of 2001 on international human rights law – that is, the way in which the war on terror has led to a greater discussion of international human rights principles in other areas of international law, most notably international humanitarian law. It may be that one of the most profound impacts of the war on terror on international human rights law is a greater acknowledgment of the relevance of this branch of law to situations of armed conflict and occupation, traditionally confined to the realm of international humanitarian law. Perhaps one reason that this literature does not feature in the human rights journals under consideration is that it does not seek to challenge or change international human rights law, but rather argues for the application of international human rights law principles in different fields. Human rights law scholars may not need to convince readers of human rights law journals of the relevance of their own discipline, however, they may need to convince general scholars of international law and scholars and practitioners of international humanitarian law, of the relevance of human rights law to situations of armed conflict.

A third feature of the articles in all five journals is the lack of discussion of the application of human rights law to non-state actors, apart from corporations. As was the case with the *Australian Journal of Human Rights*, in the four journals published outside Australia, with perhaps one or two exceptions¹⁴³ (and acknowledging some early consideration of the most appropriate avenue for prosecution of terrorist crimes)¹⁴⁴ discussion of human rights abuses by non-state

'Critical Analysis of the International Court of Justice's Ruling on Israel's Security Barrier' (2005–2006) 29 *Fordham International Law Journal* 181; H Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *Journal of Conflict and Security Law* 268; C Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310; M A Hansen, 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' (2007) 194 *Military Law Review* 1; R McLaughlin, 'The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications' (2010) 13 *Yearbook of International Humanitarian Law* 213. See also special edition on the relationship between international humanitarian law and human rights law, (2008) 90 *International Review of the Red Cross*.

¹⁴³ For example, R McCorquodale and R LaForgia, 'Taking off the Blindfolds, Torture and the Responsibility of Non-State Actors' (2001) 1 *Human Rights Law Review* 189. This article was published prior to September 2001.

¹⁴⁴ R J Goldstone and J Simpson, 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism' (2003) 16 *Harvard Human Rights Journal* 13;

actors post-2002 is limited to the liability of corporations.¹⁴⁵ Literature on the application of international human rights law to non-state actors has been published outside these journals, with such scholarship tending to deal with the application of both international humanitarian law and human rights law.¹⁴⁶ The difficulty in applying treaty-based international human rights law to non-state actors and the absence of mechanisms for considering abuses by terrorists has been noted by authors¹⁴⁷ and may constitute one reason for the lack of analysis of the application of human rights law to armed groups in the five journals. Although it is true that human rights mechanisms deal with violations by states, scholars have examined ways to apply human rights law to other non-state actors, notably corporations. Suggestions that future mechanisms, for example a World Court of Human Rights, could have jurisdiction over state and non-state actors¹⁴⁸ (including terrorist organisations) have not been systematically taken up by scholars. The lack of scholarship in these journals on the question whether non-state actors, aside from corporations, could be liable for human rights abuses evokes comments (reproduced earlier) that human rights activists have failed to criticise the actions of armed groups with the same fervour that they have used to condemn the actions of governments.¹⁴⁹

Before concluding this section on human rights scholarship, one final feature of the articles in all five journals should be noted: notwithstanding the significant contributions in the *Human Rights Law Review*, the *Human Rights Quarterly*, and the *Harvard Human Rights Journal* on the war on terror and associated issues, in all three journals this scholarship was in the minority. This is particularly evident in the two journals published in the United States, where contributions, both before and after 2001 discussed a wide range of issues across economic, social and cultural rights, as well as civil and political rights. Thus, despite the literature concentrating on the war on terror, it appears that most scholars and activists writing in these journals continued to concentrate on rights issues outside the paradigm of the war on terror in the last decade.

M A Drumbl, 'Judging the 11 September Terrorist Attack' (2002) 24 *Human Rights Quarterly* 323.

¹⁴⁵ See D Kinley and R Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 *Human Rights Law Review* 447; D Mzikenge Chirwa, 'The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law' (2006) 22 *South African Journal on Human Rights* 76; R L Herz, 'The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement' (2008) 21 *Harvard Human Rights Journal* 207.

¹⁴⁶ For example, A Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *International Review of the Red Cross* 491; A Bellal, G Giacca and S Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 *International Review of the Red Cross* 47.

¹⁴⁷ See Bellal, Giacca and Casey-Maslen, above n 146, 64; Scheinin, above n 3.

¹⁴⁸ Scheinin, above n 3, 586.

¹⁴⁹ See text accompanying n 50.

IV. Teaching Human Rights Law

Having considered the impact of the events of 2001 on human rights scholarship, the focus in this article now turns to the teaching of human rights law in Australian universities. In this context I would like to reflect on the question whether the events of 2001 have significantly changed the way in which human rights law is taught in Australian law schools.¹⁵⁰ To respond to this question, I examined the subject descriptions for human rights law subjects taught in law schools as provided on the institutions' websites in 2011. The subject descriptions on these websites reveal an enormous variation in the quantity of publicly available information about the content of individual units – some university websites provide lengthy details about learning objectives and topics, whereas others provide only a brief synopsis of the course. Therefore, in order to gain a better understanding of the way in which the events of 2001 may be used in individual courses, I also examined eight reading guides of human rights law subjects taught in 2011–2012 from a few Australian law schools. Finally, I analysed the topics included in the three editions of the leading casebook in the field: Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, published in 1996, 2000 and 2008 respectively.¹⁵¹ The survey of university courses concentrates on either general international or domestic human rights law courses unless otherwise specified.¹⁵² Matters concerning human rights law and the war on terror may be raised in other subjects (for example, Constitutional Law, International Law or introductory law units), however, by concentrating on subjects specialising in human rights it is possible to examine the extent to which the events of 2001 have altered the way that human rights law as a separate discipline is taught. This survey does not distinguish between subjects labeled as either 'international human rights law' or 'human rights law' more generally, mainly because, as the subject

¹⁵⁰ The 34 universities with law departments, schools or faculties in 2011 were the Australian National University, University of Canberra, Macquarie University, The University of Notre Dame, Australia (Sydney), Southern Cross University, the University of New England, the University of New South Wales, the University of Newcastle, the University of Sydney, the University of Technology Sydney, the University of Western Sydney, the University of Wollongong, Charles Darwin University, Bond University, CQ University Australia, Griffith University, James Cook University, Queensland University of Technology, University of Southern Queensland, University of Queensland, Flinders University, University of Adelaide, University of South Australia, University of Tasmania, Deakin University, La Trobe University, Monash University, RMIT University, University of Melbourne, Victoria University, Edith Cowan University, Murdoch University, University of Notre Dame Australia (Fremantle), University of Western Australia. For the purposes of the survey, Notre Dame Law School in Sydney and Fremantle are treated together as unit descriptions, including for the subject 'Human Rights', are identical. CQ University Australia is not included in the survey as the LLB degree only commenced in 2011 and therefore no elective subjects were taught in that year.

¹⁵¹ See H Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals* (1996); H Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, 2000); H Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2008).

¹⁵² This survey does not include human rights subjects which are taught outside law schools in Australian universities.

descriptions disclose, international human rights law is often dealt with in courses with a domestic focus, and vice versa.

The first point to note is that all Australian law schools listed elective subjects devoted to human rights law in either one or all of their undergraduate and postgraduate taught courses (including the LLB, JD or Masters degrees). In some universities human rights law courses are offered on an annual basis whereas other institutions offer these subjects in alternate years. As a comparison, Dianne Otto's study of the teaching of international law in Australian universities, published in 2000, reveals that 19 of the 28 law schools offered elective LLB courses in (international) human rights law.¹⁵³ In 1984, a survey by James Crawford of international law teaching in Australia found that seven of the 12 institutions offered such courses (at either the undergraduate or postgraduate level).¹⁵⁴ The prevalence of human rights law subjects in 2011 highlights that such units are an accepted part of the curriculum in Australian law schools.

In terms of the events of 2001 and the war on terror, the subject descriptions of units taught at seven Australian institutions specifically mention the impact of terrorism as being discussed in the course.¹⁵⁵ One course description, for the subject 'Human Rights' taught at the University of Notre Dame Faculty of Law, contextualises its description of international human rights in terms of the challenges posed by the rise in international terrorism.¹⁵⁶ However, as indicated earlier, many subject descriptions are very brief and may not reflect the specific content included by individual lecturers or the examples they may use to illustrate general principles. Thus, the way in which colleagues have integrated discussion of the events of 2001 in their subject reading guides is also of interest. Incorporation of the events of 2001 in human rights law courses appears to have occurred in the

¹⁵³ D Otto, 'Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of International Law' (2000) 1 *Melbourne Journal of International Law* 35, 67. A point of difference is that Otto's survey only deals with LLB electives, whereas the current discussion does not distinguish between undergraduate and postgraduate electives. Since 2000, there has also been a proliferation of JD courses in Australian law schools.

¹⁵⁴ J Crawford, 'Teaching and Researching International Law in Australia' (1981–83) 10 *Aust YBIL* 176, 197–201.

¹⁵⁵ The seven law schools are the ANU ('International Law of Human Rights', LLB, 'Human Rights Law in Australia', LLB, 'Australian Human Rights and Discrimination Law', LLM, 'International Human Rights Law', LLM), Macquarie University ('Human Rights and Moral Dilemmas', LLB and Postgraduate); University of Newcastle ('International Human Rights Law', LLB); RMIT University ('Human Rights Law in Australia', Postgraduate); University of Notre Dame ('Human Rights', LLB); University of Melbourne ('International Human Rights Law', JD and 'International Human Rights Law', LLB); and University of Tasmania ('Human Rights', LLB). Although 'International Human Rights Law' and 'Human Rights and Anti-Discrimination Law' are listed on the website of the University of Southern Queensland, course descriptions are not provided.

¹⁵⁶ The course description commences as follows: 'The rise in international terrorism poses significant challenges and dilemmas. It undermines the basic rights of the individual, and on occasions, tempts States to act outside the rule of law.' See University of Notre Dame Australia *Units: Law* <<http://www.nd.edu.au/units/lw.shtml>>.

following ways: the inclusion of a separate topic within the general course on national security or terrorism,¹⁵⁷ the use of the war on terror and counterterrorism legislation as a basis for the discussion of broader themes,¹⁵⁸ and the insertion of materials and readings relevant to the war on terror in individual topics on torture or derogations from human rights law.¹⁵⁹ Some colleagues have used a combination of such approaches. Although new units on national security and terrorism in human rights subjects primarily concentrate on civil and political rights, the impact of the war on terror on the enjoyment of economic and social rights is also a topic of discussion.¹⁶⁰ At least one reading guide asks whether there is a human right to human security and another asks students to consider whether terrorists also hold rights obligations towards individuals.¹⁶¹ Within these course structures, many of the ‘traditional’ topics continue to be emphasised (for example, the philosophical basis of human rights, the role of international and regional institutions, and the application of human rights law in Australia).¹⁶² This analysis demonstrates that as a whole, it does not appear that the events of 2001 have significantly changed the way in which a general (international) human rights law course has been taught in Australian universities in 2011 and 2012 — although individual topics on national security and terrorism have been incorporated, the fundamental structure of the subjects remains the same.

As well as these general human rights law subjects, some law schools are also offering specific courses on human rights and terrorism (Monash and Melbourne Masters), and National Security Law and Human Rights (University of New South Wales LLB). The subject descriptions of the courses taught at Melbourne and Monash introduce the two courses by specifically referring to the events of 2001,¹⁶³ thus there can be no doubt about their genesis. In addition, at least three law schools

¹⁵⁷ For example, ‘International Human Rights Law’ (Melbourne, LLB, 2011); ‘International Human Rights’ (UNSW, Postgraduate, 2011).

¹⁵⁸ For example, the first topic in the reading guide of ‘International Human Rights Law’ (Melbourne, LLB, 2011), ‘The Importance of Critical Engagement’ makes reference to the war on terror.

¹⁵⁹ For example, ‘Human Rights Law’ (La Trobe, LLB, 2012); ‘International Human Rights’ (Monash, LLB, 2012); ‘International Human Rights Law’ (ANU, Graduate, 2011); ‘International Human Rights’ (Flinders, LLM, 2011).

¹⁶⁰ For example, ‘Human Rights Law in Australia’ (ANU, LLB, 2011); ‘International Human Rights Law’ (Melbourne, LLB, 2011),

¹⁶¹ ‘Human Rights Law in Australia’ (ANU, LLB, 2011); ‘International Human Rights’ (UNSW, Postgraduate, 2011).

¹⁶² Of course, there may have been changes within the ten-year period. For example, subjects taught earlier in the decade may have included greater discussion of issues arising from 2001, illustrating Hoffman’s comment that our answer to the question ‘did the events of 2001 change the world forever’ may depend on when we ask the question.

¹⁶³ The course description for ‘Terrorism and Human Rights’ at Monash University commences with the following sentence: ‘The first years of the new millennium have seen an intense focus on the issue of global terrorism as a result of the attacks on the United States in 2001 and the subsequent “war on terror”.’ Similarly, the course description for ‘Human Rights and Terrorism’ taught at the Melbourne Law School, begins as follows: ‘Since 11 September 2001, there has been a universal trend towards new laws and new measures against terrorism.’

(Sydney, Edith Cowan and Deakin) list subjects focusing on terrorism and the law, although these courses are not directed specifically to the field of human rights law. There is no specific mention of the arrival of the M/V *Tampa* and its subsequent relevance to the domestic implementation of Australia's refugee obligations in any of the human rights law course descriptions, although pertinent issues may be incorporated into topics on refugee law (where refugee law is included in the general course). Given that a number of universities have specialist subjects in the field of refugee law and migration law,¹⁶⁴ it is likely that such discussion would occur in these units. Significantly, since Otto's 2000 survey of public international law teaching in Australia, a number of universities have introduced new courses in international humanitarian law (IHL) at the level of a first law degree (LLB or JD). Crawford's 1984 survey of both undergraduate and postgraduate subjects indicated that only the University of New South Wales taught IHL as a separate undergraduate unit,¹⁶⁵ whereas in 2000 three law schools taught IHL or International Criminal Justice at the undergraduate level.¹⁶⁶ In contrast, by 2011, 13 law schools listed these subjects as being taught in their undergraduate or JD degrees.¹⁶⁷ Such courses often include analysis of the relationship between human rights law and international humanitarian law, and at least one course description explicitly includes reference to international terrorism as a topic of discussion.¹⁶⁸

Finally, the development of one of the leading casebooks, *International Human Rights in Context*, used in human rights law courses in Australia and overseas, would suggest that issues of national security arising from the war on terror have significantly affected some topics featured in human rights law courses. The casebook, authored by Henry Steiner, Philip Alston (and Ryan Goodman) was first published in 1996, with the second edition appearing in 2000 and the third edition in 2008.¹⁶⁹ The first edition includes sections on the historical development of rights, human rights institutions and processes, the role of states as protectors and enforcers of human rights, and an illustrative study focusing on women's rights. 'Current topics' are listed as self-determination, international crimes and development. In the second edition, there are some alterations, but a similar list of

¹⁶⁴ For example, Queensland University of Technology, University of Melbourne, University of Sydney, University of Technology Sydney, and University of Western Australia.

¹⁶⁵ Crawford, above n 154, 200.

¹⁶⁶ Otto, above n 153, 66.

¹⁶⁷ 'International Humanitarian Law' and/or 'International Criminal Law/Justice' are now listed as subjects in the LLB or JD degrees at Monash University, Murdoch University, Southern Cross University, University of New South Wales, University of Tasmania, University of Melbourne, University of Western Australia, University of Queensland, University of Technology Sydney, University of Western Sydney, Bond University, Flinders University, and La Trobe University. It should be noted that some human rights law and international law units also include topics on international humanitarian law.

¹⁶⁸ See 'International Humanitarian Law', University of Technology Sydney.

¹⁶⁹ Steiner and Alston, *International Human Rights in Context* (1996), above n 151; Steiner and Alston, *International Human Rights in Context* (2nd ed, 2000) above n 151; Steiner, Alston and Goodman, *International Human Rights in Context* (3rd ed, 2008), above n 151.

current topics is included in the final section of the book. The clearest changes to the content occur in the third edition. The 2008 edition includes sections entitled 'Torture Revisited' and 'National Security, Terrorism and Limitations on Human Rights'. The section on the European Court of Human Rights includes reference to jurisdiction and the *Al-Skeini Case*, and the section on non-state actors and human rights extracts documents on the application of human rights law to armed opposition groups.¹⁷⁰ Although these changes are significant, the events of 2001 and their aftermath were not the only new topics incorporated in the 2008 edition, which also includes sections on human rights and climate change. Consequently, the events of September 11, and more particularly the response to those events, were viewed as important to the application of international human rights law by the authors, but other changes in the last decade were also perceived as relevant. This description of the changes to the casebook *International Human Rights in Context*, accords with the earlier analysis of human rights law teaching in Australia. While the war on terror and its implications for international human rights law have been discussed in human rights law subjects, this discussion has not fundamentally altered the way in which such courses have been structured and taught.

V. Conclusion

This article has considered whether the events of 2001 and their aftermath changed the world of international human rights law by reflecting on three questions: where do we place 2001 in the historical development of international human rights law and its implementation in Australia, what is the impact of 2001 on human rights scholarship, and how have the events of 2001 influenced the teaching of human rights law in Australia? In terms of the framework adopted in this article, a number of conclusions may be reached. First, although it may be tempting to regard the world prior to September 11 as being on a continuous upward trajectory towards the legalisation and enforcement of human rights since World War II, a trajectory that was severed by the events of 2001, this would be a very gilded view of the history of international human rights law. The development of international human rights law post-1945 reveals that, despite progress in many areas, there were substantial difficulties in ensuring compliance with the legal principles prior to 2001. Certainly, the actions of terrorists and the abuses committed in the name of the war on terror since September 11 have raised many concerns, but lawyers have responded to such violations by relying upon existing human rights norms and institutions to challenge government actions. In addition, there has been substantial progress in many areas in the last decade, including the development of human rights institutions to enforce compliance with the law. It is possible that in ten years' time we may regard other global events, including the global financial crisis, as having a longer-term impact

¹⁷⁰ This final section concentrates on more formal armed opposition groups under international humanitarian law, rather than organisations such as al-Qaeda. However, the section concludes with the following statement: 'the assumption of many humanitarian law experts that human rights law applies only to governments, and not to unrecognized insurgents, is no longer a universally shared assumption': Steiner, Alston and Goodman, *International Human Rights in Context* (3rd ed, 2008) above n 151, 1420.

on the way in which the discipline of human rights is practised.¹⁷¹ Consequently, it is difficult to conclude that the history of international human rights law ended (or began) in 2001.

The analysis of human rights scholarship and teaching reinforces this conclusion. While human rights scholars have written on issues arising out of the events of 2001 and their aftermath, the majority of scholarship in the five journals selected for this study was not related to the war on terrorism, or in the case of Australia, the arrival of the M/V *Tampa*. However, two changes in the articles published in the five journals are revealing. First, perhaps the most important change in the scholarship published in the two US journals was an increase in the discussion of violations, including torture, by the United States committed in the name of the war on terror, whereas previously discussion of such abuses occurred in the context of other states. Second, while the number of articles in the *Australian Journal of Human Rights* discussing human rights issues arising from the September 11 attacks was small, there was a wealth of literature dealing with refugee issues published post-2002. For Australian scholars it appears that the government's response to the arrival of the M/V *Tampa* represented a vehicle for critiquing existing, as well as new, policies on refugees. Scholarship published outside the five journals under review also reveals that human rights law is being applied in new contexts, including armed conflict, and consequently, commentators and practitioners are using human rights principles, as well as more traditional principles of international humanitarian law, to test the validity of states' actions in war zones. But these discussions have not resulted in fundamental changes to the principles of human rights law, but rather have resulted in the application of existing principles to new areas. In Australia, human rights law courses have accommodated developments relevant to the events of 2001 through the addition of new topics on national security and the use of examples based on the war on terror for existing topics (notably the prohibition on torture). In addition, specialist courses have been established in some law schools, concentrating on either terrorism generally or terrorism and human rights specifically. Overall, it does not appear that the structure and rationale of human rights law courses in Australia has fundamentally changed due to the war on terrorism or the arrival of the M/V *Tampa*.

¹⁷¹ Recently, human rights lawyers have examined the relationship between human rights and the stability of the international financial system: see M Dowell-Jones and D Kinley, 'Minding the Gap: Global Finance and Human Rights' (2011) 25 *Ethics and International Affairs* 183. In addition, human rights organisations have noted the detrimental impact of the global financial crisis on the protection of rights. For example, see Amnesty International, *Amnesty International Report: The State of the World's Human Rights* (2010), 14 <<http://thereport.amnesty.org/>> (arguing that the global financial crisis risks exacerbating the denial of the 'rights to health care, clean water, education and adequate housing' of the marginalised and dispossessed); K W Todrys and J J Amon, 'With but Without: Human Rights and Access to HIV Prevention and Treatment for Internal Migrants' (2009) 5 *Globalization and Health* 17 (discussing the impact of the global financial crisis on the ability of internal migrants to realise their right to health, including to access antiretroviral therapy).

To return to Hoffman's original question ('has the world changed forever') it may be too soon to tell how widely and for how many years the impact of the events of 2001 will be felt on the promotion and protection of human rights law. There is no doubt that the terrorists' actions and the war on terror have resulted in significant challenges to human rights law, and that the law has been used as an instrument to question and critique these developments. The history of international human rights law is replete with such challenges, as well as some significant progress along the way.